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In The

Supreme Court of the United States

UFO CHUTING OF HAWAII, INC., et al.,

Petitioners,

vs.

ALLAN A. SMITH, CHAIR AND ACTING DIRECTOR OF THE BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE OCEAN TOURISM COALITION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT H. THOMAS
MARK M. MURAKAMI*
CHRISTI-ANNE H. KUDO CHOCK

DAMON KEY LEONG
KUPCHAK HASTERT
1600 Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813
(808) 531-8031

**Counsel of Record*

Counsel for Amicus Curiae Ocean Tourism Coalition

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May state regulation totally prohibit the free navigation of federally licensed vessels for five months of the year without violating the Supremacy Clause?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF AMICUS CURIAE OCEAN TOURISM COALITION	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THIS COURT'S INTERVENTION IS NEEDED TO PRESERVE UNIFORM NATIONAL LAWS REGULATING COASTAL WATERS	3
A. STATES ARE REGULATING BALLAST WATER ON SHIPS EVEN AS THE FEDERAL GOVERNMENT CONSIDERS REGULATIONS	5
B. STATES AND EVEN COUNTIES ARE PURPORTING TO REGULATE NAVIGATION TO PROTECT ENDANGERED SPECIES	7
C. STATES ARE ATTEMPTING TO REGULATE FUELS USED BY OCEAN-GOING VESSELS IN FOREIGN TRADE	8
II. A COMPLETE BAN ON FEDERALLY LICENSED VESSELS FROM NAVIGABLE WATERS FOR FIVE MONTHS OF EACH YEAR CONFLICTS WITH FEDERAL COASTWISE LAW	8
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) 4, 11

Fednav, Ltd. v. Chester, 505 F. Supp. 2d 381 (E.D. Mich. 2007) 6

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 9

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 3, 9

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 9

Northwest Envtl. Advocates v. Envtl. Protection Agency, 2006 U.S. Dist. Lexis 69476 (N.D. Cal. 2006) 6

Pacific Merchant Shipping Ass'n v. Goldstene, 517 F.3d 1108 (9th Cir. 2008) 8

United States v. Locke, 529 U.S. 89 (2000) 2, 4, 6

Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2001) 12

Young v. Coloma-Agaran, 340 F.3d 1053 (9th Cir. 2003) 9

STATUTES, REGULATIONS, AND RULES

Ballast Water Treatment Act of 2008, H.R. 2830, 110th Cong., Title V, §§ 501-507 5

Submerged Lands Act, 43 U.S.C. §§ 1301-1315 ..... 11, 12

TABLE OF AUTHORITIES – Continued

Page

Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, § 213, 118 Stat. 2809 (2004) 12

Cal. Pub. Resources Code §§ 71200-71217 (2008) 6

Haw. Rev. Stat. § 187A-32 (Supp. 2007) 6

Haw. Rev. Stat. § 200-37(i) (Supp. 2007) 10

Haw. Rev. Stat. § 200-38(c) (Supp. 2007) 10

H.B. 2919, 24th Leg. (Haw. 2008) *available at* www.capitol.hawaii.gov/session2008/Bills/HB2919_.pdf 8

Haw. Admin. R. § 13-256-112 (1994) 10

Mich. Comp. Laws § 324.3112[illegible] (2008) 6

H. Bill 2514, 60th Leg. (Wash. 2008) 7

San Juan, Washington, County Ord. No. 35-2007, *available at* http://www.sanjuanco.com/council/docs/ordinances/2007/Ord%2035-2007_0001.pdf 7

OTHER AUTHORITIES

"Environmentalists Sue as Virus Aims at Lake Superior's Fish," THE STAR-TRIBUNE, May 1, 2008 5

"The IMO Guidelines," *available at* http://globallast.imo.org 5

TABLE OF AUTHORITIES – Continued

Page

"Lake Superior Ballast Water Must Be Regulated Judge Says MPCA Must Act to Halt Fish-Killing Virus," ST. PAUL PIONEER PRESS, April 23, 2008, at B1 6

Supreme Court Rule 37 1

IDENTITY AND INTEREST OF AMICUS CURIAE OCEAN TOURISM COALITION

Amicus curiae Ocean Tourism Coalition (OTC) respectfully submits this brief in accordance with Supreme Court Rule 37.[1]

OTC is the only statewide commercial boating organization in Hawaii, and represents approximately 300 charter and tour boat companies serving the ocean tourism industry. Although OTC's members are typically small businesses with less than ten employees, they accommodate visitors from all fifty states and many foreign nations, and virtually all of its members operate vessels in the coastwise trade in federally navigable waters under federal licenses. For example, OTC's members operate inter-island cruise ships, 149 passenger sail and dinner cruise boats, submarines, and charter fishing boats. Nationally, the parasailing industry alone accounts for approximately $200 million of gross revenues and employs more than 2,000 people. The overwhelming majority of the customers of Hawaii's parasailing business –

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[1] All counsel of record consented to the filing of this brief, and received notice of amicus's intention to file this brief at least ten days before this brief was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus curiae made a monetary contribution toward the preparation or submission of this brief. Petitioner is a member of OTC, but was excluded from any role in the decision to authorize this brief and did not, and will not, make any monetary contribution towards its preparation or submission.

98% – are visitors from other states and foreign countries.

The State of Hawaii's total prohibition on parasailing in the federally navigable waters off of Maui for five months of the year will have a devastating impact on many of OTC's members, and the ruling by the court below will likely have the effect of putting them out of business at a time when rising gas prices and the bankruptcies of two of Hawaii's major air carriers has severely affected the Hawaii tourism industry – an industry on which the State depends.

SUMMARY OF ARGUMENT

In affirming the dismissal of Petitioners' claims, the Ninth Circuit held that a state's complete exclusion of federally-licensed vessels from navigable waters was permissible since it did not ban the vessels year-round. The Court of Appeals determined that because Hawaii only bans parasailing in waters off the coast of Maui for five months of each year, the prohibition is not a "complete exclusion" of federal licensed coastwise navigation and was therefore permissible. After this Court's decision in *United States v. Locke*, 529 U.S. 89 (2000), which held that a "comprehensive scheme of [federal] regulation preempted more restrictive state regulations, the states, not waiting for the federal government to act, enacted regulations to address perceived shortcomings in federal law. Shippers, boaters, and owners of

federally licensed vessels, such as Petitioner and Amicus, are now subject to a patchwork of overlapping and conflicting federal and state regulations.

ARGUMENT

I. THIS COURT'S INTERVENTION IS NEEDED TO PRESERVE UNIFORM NATIONAL LAWS REGULATING COASTAL WATERS.

The issue presented by the Petition is of pressing national importance. With the increasing federal presence in the nation's ports after the September 11, 2001 terrorist attacks, delineating the boundaries between federal and state authority to regulate interstate and foreign commerce in coastal waters is crucial. For over 200 years, the regulation of maritime commerce and navigation has been a fundamentally federal concern. The ability of the States to regulate coastal waters has always been circumscribed by the federal government's paramount interest in regulating maritime trade. Until the decision of the Ninth Circuit below, a licensee's right to freely navigate while sailing under a federal coastwise license had been unquestioned. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) ("The acts of the Legislature of the State of New-York, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State . . . are repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce, so far as

the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam."); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 273 (1977) ("The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since.").

In *United States v. Locke*, 529 U.S. 89, 99 (2000), this Court held "[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, is cited in the Federalist Papers as one of the reasons for adopting the Constitution." Consequently, the Court invalidated the State of Washington's attempt to regulate the operations of tankers to prevent oil spills, holding that, because federal regulation of oil tankers was "comprehensive," the states were prohibited from enacting more stringent regulations. *Id.* at 116-17 ("The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate."). After *Locke*, the question remained whether a less "comprehensive scheme of [federal] regulation" would similarly preempt state attempts to impose more stringent regulations on areas of traditional federal authority. Even where the federal government has undertaken efforts to enact nationwide regulations, the states have enthusiastically

entered that void, resulting in a patchwork of overlapping and potentially conflicting regulations.

A. STATES ARE REGULATING BALLAST WATER ON SHIPS EVEN AS THE FEDERAL GOVERNMENT CONSIDERS REGULATIONS.

For example, maritime commerce, particularly from foreign waters, is increasingly seen as a threat vector for invasive species, and the pressure is on both the state and federal governments to regulate this area. The House of Representatives recently approved the Ballast Water Treatment Act of 2008, a bill requiring certain technology on vessels to prevent invasive species. *See* H.R. 2830, 110th Cong., Title V, §§ 501-507.[2] The United States Coast Guard was recently sued to compel it to pass similar ballast water regulations. "Environmentalists Sue as Virus Aims at Lake Superior's Fish," THE STAR-TRIBUNE, May 1, 2008, *available at* www.startribune.com/local/18436694.

While Congress and federal agencies work to enact a uniform nationwide regulatory scheme, however, several states, including Michigan, Hawaii and California, have not waited for the federal government to act, and have enacted regulations requiring

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[2] The International Maritime Organization ("IMO") is involved in efforts to combat the problem as well. *See* "The IMO Guidelines," *available at* http://globallast.imo.org.

extensive prophylactic measures for vessels making port calls in their ports. *See, e.g.*, Mich. Comp. Laws § 324.3112(6) (Supp. 2008) (requiring all oceangoing vessels engaging in port operations to obtain a permit which shall be granted only if the applicant can demonstrate that the vessel will not discharge aquatic nuisance species); Haw. Rev. Stat. § 187A-32 (Supp. 2007) (authorizing rules to prevent the introduction and carry out the destruction of aquatic organisms through the regulation of ballast water discharges); Cal. Pub. Resources Code §§ 71200-71217 (2008) (comprehensive legal and regulatory authorization to remove nonindigenous species from California waters). Indeed, despite the *Locke* decision, several courts have declined to invalidate state efforts to regulate ballast waters.

Recently, the District Court for the Eastern District of Michigan refused to invalidate a Michigan statute which regulates ballast water on foreign vessels. *Fednav, Ltd. v. Chester*, 505 F. Supp. 2d 381 (E.D. Mich. 2007). *See also Northwest Envtl. Advocates v. Envtl. Protection Agency*, 2006 U.S. Dist. Lexis 69476, at *45 (N.D. Cal. 2006) (enjoining the federal government to pass Clean Water Act regulations within two years to address invasive species). Similarly, a Minnesota state court ordered the State of Minnesota Pollution Control Agency to draft ballast water regulations to prevent a viral disease borne by invasive species. *See* "Lake Superior Ballast Water Must Be Regulated Judge Says MPCA Must Act to Halt Fish-Killing Virus," ST. PAUL PIONEER PRESS, April 23, 2008, at B1.

B. STATES AND EVEN COUNTIES ARE PURPORTING TO REGULATE NAVIGATION TO PROTECT ENDANGERED SPECIES.

Hawaii's parasailing ban is not the only state regulation of commerce and navigation intended to protect marine mammals that infringes on federal coastwise law. During the pendency of the National Oceanic and Atmospheric Administration's rulemaking project to create regulations governing the standards for approaching orca in Puget Sound, the State of Washington and San Juan County each enacted legislation that purported to limit the ability of vessels to freely navigate in order to protect orca. *See* H. Bill 2514, 60th Leg. (Wash. 2008) (enacted). The Washington State legislature determined that "the federal government has initiated the process to adopt the orca conservation rules, but *this process may be lengthy*." *Id.* § 1 (emphasis added). Similarly, San Juan County purports to regulate "the operation of vessels in proximity to the southern resident killer whale." *See* San Juan Washington County Ord. No. 35-2007, *available at* http://www.sanjuanco.com/council/docs/ordinances/2007/Ord%2035-2007_0001.pdf. There, the San Juan County Council determined that "more clear, understandable and enforceable standards are desired to regulate vessel operation in proximity to the southern resident killer whale" and "San Juan County has been informed that the [federal rulemaking] . . . is likely to take some time to complete. . . ." *See id.* In other words, a local government has decided that the federal government's regulations are

insufficient, and the process for enacting those regulations is taking too long.

C. STATES ARE ATTEMPTING TO REGULATE FUELS USED BY OCEANGOING VESSELS IN FOREIGN TRADE.

Concerns with the air pollution caused by the type of fuel used by some large oceangoing vessels have prompted several states to implement or consider banning the use of such fuels. *See* H.B. 2919, 24th Leg. (Haw. 2008) *available at* www.capitol.hawaii.gov/session2008/Bills/HB2919_.pdf. The Ninth Circuit recently addressed one such initiative to regulate fuels when it struck down the Port of Long Beach, California's ban. *See Pacific Merchant Shipping Ass'n v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008) (California's fuel regulation preempted by Clean Air Act).

II. A COMPLETE BAN ON FEDERALLY LICENSED VESSELS FROM NAVIGABLE WATERS FOR FIVE MONTHS OF EACH YEAR CONFLICTS WITH FEDERAL COASTWISE LAW.

Against this regulatory backdrop – with states and local governments aggressively regulating areas constitutionally reserved to the national government – the Ninth Circuit's approval of Hawaii's five-month total ban on Petitioners' federally-licensed vessels takes on added significance. The Ninth Circuit's decision, if left standing, will result in a hodgepodge of state and

federal regulations and a further balkanization of authority regulating and impacting interstate and international commerce. Additionally, this case presents the Court with an opportunity to clarify whether a state's total – but temporal – restriction of federally-licensed vessels from engaging in the only purpose for which they are useful is an impermissible local burden on interstate commerce.

The Ninth Circuit's decision was erroneous for at least three reasons. First, federally-licensed vessels enjoy "sweeping" rights to engage in coastwise trade, navigation, and commerce. *See, e.g., Young v. Coloma-Agaran*, 340 F.3d 1053, 1056 (9th Cir. 2003) ("The sweeping nature of the coasting license is premised on the idea that the right to engage in interstate commerce derives from the natural law and the Constitution confers *absolute* control of its regulation to congress.") (emphasis added) (citing *Gibbons*, 22 U.S. at 211). "The scope of the privilege granted by the federal licensing scheme has been well delineated . . . [a] state may not exclude from its waters a ship operating under a federal license." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960) (citation omitted). *See also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Hawaii's prohibition of federally-licensed vessels from operating in navigable waters off Maui undoubtedly interferes with Petitioners' right to engage in interstate commerce, navigation, and coastwise trade:

> Between December 15 and May 15 of each year, no person shall operate a thrill craft, or

> engage in parasailing, water sledding, or commercial high speed boating, or operate a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui as provided in section 200-38.

Haw. Rev. Stat. § 200-37(i) (Supp. 2007). *Accord* Haw. Admin. R. § 13-256-112. Furthermore, section 200-38 provides:

> Notwithstanding any other law to the contrary, no person shall operate a thrill craft, engage in parasailing, operate a motorized vessel towing a person engaged in parasailing, engage in commercial water sledding or commercial high speed boating, or operate a commercial motor vessel towing a person engaged in water sledding between December 15 and May 15 of each year in the waters of west and south Maui from Pu`u Ola`i to Hawea Point.

Haw. Rev. Stat. § 200-38(c) (1993).

Despite the total exclusion of Petitioners' federally-licensed vessels' unrestricted navigation, the Ninth Circuit held the regulations did not effect a "complete exclusion" of commerce because they did not prohibit protected navigation year-round. Under *Douglas*, states are limited in their ability to regulate commerce that is federally sanctioned via a coastwise license. *Douglas*, 431 U.S. at 277-285 ("States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures

otherwise within their police power.") (emphasis added). The Ninth Circuit overlooked the predicate question: Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (2000), does Hawaii even have the police power to regulate navigation? The Act limits the ability of the states to enact regulations which interfere with commerce, navigation, defense, and international affairs. While states were granted regulatory powers over the submerged lands, and waters above those lands from the coast line to three nautical miles seaward, the Act expressly provides that federal law regulating interstate commerce and navigation is "paramount" to any state's attempts to concurrently regulate these resources. The Act provides:

> The United States retains all its . . . powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, *all of which shall be paramount to*, but shall not be deemed to include, proprietary rights of ownership, or the rights of *management*, administration, leasing, use, and development of the lands and *natural resources* which are specifically recognized, confirmed, established, and vested in and assigned to the respective States. . . .

43 U.S.C. § 1314(a) (2000) (emphasis added). Thus, Hawaii has no "police power," as that term is used in *Douglas*, to adopt statutes affecting navigation.

Second, the Ninth Circuit's determination that the Constitution tolerates a complete exclusion of federal commerce for part of the year is contrary to the Fourth Circuit's holding in *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001), which found that Virginia's ban on the shipment of municipal solid waste was preempted by the coastwise license. *Id.* at 348.

Finally, the Ninth Circuit erroneously viewed the Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, § 213, 118 Stat. 2809 (2004), as Congress' attempt to moot all issues in this case, which it plainly did not do. That bill only purported to allow Hawaii's regulations to supersede federal laws "related to the conservation and management of marine mammals."[3] The bill did not purport to surrender *all* federal regulatory authority under the Submerged Lands Act or the federal coastwise law. Nonetheless, the Ninth Circuit interpreted the bill as an official

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[3] Section 213 of the 2005 Omnibus Appropriations Bill provides the following:

> Notwithstanding any other *federal law related to the conservation and management of marine mammals*, the State of Hawaii may enforce any state law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purposes of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, 118 Stat. 2809 (2004) (emphasis added).

declaration that Hawaii's parasailing ban did not interfere with federally-protected commerce.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ROBERT H. THOMAS
MARK M. MURAKAMI*
CHRISTI-ANNE H. KUDO CHOCK

DAMON KEY LEONG
KUPCHAK HASTERT
1600 Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813
(808) 531-8031

**Counsel of Record*

Counsel for Amicus Curiae
Ocean Tourism Coalition